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NO. 370186

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JOHANNA LARSON,

Appellant,

v.

CENTRAL WASHINGTON UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. SUMMARY OF THE ARGUMENT.....2

III. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR3

 1. Whether summary judgment was properly granted when Larson has provided no evidence that disability discrimination was a substantial motivating factor in her termination from the University.3

 2. Whether summary judgment was properly granted when Larson and her attending provider agreed that her shoulder injury was fully accommodated and Larson provided no evidence to show that the University failed to accommodate her shoulder injury or any other disability.3

 3. Whether summary judgment was properly granted when Larson provided no evidence that she was entitled to qualifying medical leave that was then interfered with by the University.....3

 4. Whether summary judgment was properly granted when Larson provided no evidence to show that she was terminated in retaliation for taking qualifying medical leave.3

IV. COUNTERSTATEMENT OF THE CASE3

 A. Larson’s Performance Issues Begin Upon Hire.....3

 B. Larson is Accommodated for Her Shoulder Injury.....8

 C. The University’s Progressive Discipline Process8

 D. Larson Stopped Coming to Work for More Than a Month9

E.	Larson Has No Medical Excuse for Her Extended Absence.....	12
F.	The Dean Determines Termination is Appropriate.....	14
V.	PROCEDURAL HISTORY	16
VI.	STANDARD OF REVIEW.....	18
VII.	ARGUMENT	19
A.	No Evidence of Disability Discrimination.....	20
1.	Larson did not establish a prima facie case of discrimination	20
2.	Larson cannot show pretext for discrimination	25
3.	No evidence of pretext.....	27
B.	No Evidence of any Failure to Accommodate.....	29
C.	Larson Did Not Establish Any Violations of the FMLA	35
1.	No Evidence of Interference or Retaliation Under WFLA.....	36
2.	Larson impermissibly raises new arguments under the FMLA not argued at the trial court.....	39
VIII.	CONCLUSION	42

TABLE OF AUTHORITIES

Cases

<i>Alonso v. Qwest Commc'ns Co., LLC</i> , 178 Wn. App. 734, 315 P.3d 610 (2013)	20
<i>Anica v. Wal-Mart Stores, Inc.</i> , 120 Wn. App. 481, 84 P.3d 1231 (2004)	22
<i>Ashcraft v. Wallingford</i> , 17 Wn. App. 853, 565 P.2d 1224 (1977)	19, 39
<i>Clayton v. Meijer</i> , 281 F.3d 605 (6th Cir. 2002)	24
<i>Coleman v. Court of Appeals of Maryland</i> , 566 U.S. 30, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012)	35
<i>Concerned Coupeville Citizens v. Town of Coupeville</i> , 62 Wn. App. 408, 814 P.2d 243 (1991)	19, 39
<i>Crawford v. JP Morgan Chase NA</i> , 983 F. Supp. 2d 1264 (W.D. Wash. 2013)	37, 38, 39
<i>Crownover v. State ex rel. Dep't of Transp.</i> , 165 Wn. App. 131, 265 P.3d 971 (2011)	30
<i>Ferrin v. Donnellfeld</i> , 74 Wn.2d 283, 444 P.2d 701 (1968)	19, 39
<i>Fulton v. Dep't of Soc. & Health Servs.</i> , 169 Wn. App. 137, 279 P.3d 500 (2012)	25, 26, 30
<i>Gamble v. City of Seattle</i> , 6 Wn. App. 883, 431 P.3d 1091 (2018)	32, 33
<i>Green v. Normandy Park</i> , 137 Wn. App. 665, 151 P.3d 1038 (2007)	19, 39
<i>Harrell v. Dep't of Soc. Health Servs.</i> , 170 Wn. App. 386, 285 P.3d 159 (2012)	35
<i>Hiatt v. Walker Chevrolet Co.</i> , 120 Wn.2d 57, 837 P.2d 618 (1992)	18
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 180, 23 P.3d 440 (2001), <i>overruled on other grounds</i> <i>by McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006)	27
<i>Johnson v. Chevron U.S.A., Inc.</i> , 159 Wn. App. 18, 244 P.3d 438 (2010)	31
<i>Marin v. King Cty.</i> , 194 Wn. App. 795, 378 P.3d 203 (2016)	23, 24
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 922 P.2d 43 (1996)	18

<i>Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.</i> , 189 Wn.2d 516, 404 P.3d 464 (2017).....	28
<i>Reeves v. Sandersen Plumbing Prods., Inc.</i> , 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).....	29
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	30, 31
<i>Russell v. Acme-Evans Co.</i> , 51 F.3d 64 (7th Cir. 1995)	28
<i>Scrivener v. Clark Coll.</i> , 181 Wn.2d 439, 334 P.3d 541 (2014).....	28
<i>Sista v. CDC Ixis N. Am. Inc.</i> , 445 F.3d 161 (2nd Cir. 2006).....	41
<i>Swinehart v. City of Spokane</i> , 145 Wn. App. 836, 187 P.3d 345 (2008).....	18

Statutes

29 U.S.C. § 2613.....	37, 40
RCW 49.60.040	30, 31
RCW 51.48.025	16

Rules

CR 56	18
CR 56(e).....	21, 24
RAP 2.4.....	36

I. INTRODUCTION

Johanna Larson was properly terminated for cause from employment at Central Washington University under a Collective Bargaining Agreement, after a progressive discipline process. Larson had been repeatedly counseled in the past regarding her poor work performance, and in each written warning, was reminded that she needed to email her supervisor as soon as she was aware that she would be absent. Yet Larson failed to report to work for more than one month and failed to provide her employer with any notification of, or medical excuse for, her absence. Consistent with the previous directives given, the Collective Bargaining Agreement requires daily notification of absences. Despite this clearly stated and oft-repeated requirement, Larson stopped going to work and did not notify her supervisor (or anyone else) of her absences. This does not constitute employment discrimination: Larson abandoned her employment.

Larson never provided medical certification showing that her month-long absence was protected as leave under the Family Medical Leave Act or its Washington counterpart, the Washington Family Leave Act. She cannot, therefore, show a claim of interference or retaliation for using protected medical leave, since both require first showing entitlement to protected medical leave, in addition to showing the adverse employment action was causally related to the use of that leave.

II. SUMMARY OF THE ARGUMENT

An employee alleging discrimination under the Washington Law Against Discrimination (WLAD) must establish each element showing a prima facie right to relief. Larson did not do so, as she provided no evidence that she was terminated due to any disability. Likewise, she did not provide any evidence of an accommodation that was medically necessary but that was not provided. The University, on the other hand, provided abundant, uncontroverted evidence that Larson was terminated for her failure to follow numerous written directives to communicate, via email, with her supervisor regarding any absences, coupled with her documented ongoing performance deficiencies.

An employee alleging interference or retaliation under either the Family Medical Leave Act (FMLA) or its counterpart, the Washington Family Leave Act (WFLA), must first show entitlement to protected medical leave. Larson admits that she was not entitled to any protected medical leave. This admission defeats any claims of interference or retaliation. Moreover, Larson did not provide any evidence that her termination was based on her use of protected leave, rather than her failure to communicate with her supervisor during a month-long absence despite repeated directives to do so.

No material facts are in dispute. Rather, Larson seeks to take advantage of an inference of discrimination without any supporting evidence. Summary judgment was properly granted and should be affirmed.

III. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether summary judgment was properly granted when Larson has provided no evidence that disability discrimination was a substantial motivating factor in her termination from the University.
2. Whether summary judgment was properly granted when Larson and her attending provider agreed that her shoulder injury was fully accommodated and Larson provided no evidence to show that the University failed to accommodate her shoulder injury or any other disability.
3. Whether summary judgment was properly granted when Larson provided no evidence that she was entitled to qualifying medical leave that was then interfered with by the University.
4. Whether summary judgment was properly granted when Larson provided no evidence to show that she was terminated in retaliation for taking qualifying medical leave.

IV. COUNTERSTATEMENT OF THE CASE

A. Larson's Performance Issues Begin Upon Hire

Larson started working at Central Washington University on August 4, 2014 as a Secretary Senior in the World Languages Department, supervised by Department Chair Dr. Laila Abdalla. CP 152-53. From the start, Larson struggled to perform her position. CP 153. Her written work lacked professionalism and was rife with mistakes; she did not complete all

the tasks she was given or perform all the work she was assigned; she did not communicate important information to Abdalla; she would make important decisions without communicating with Abdalla; she violated confidentiality requirements; and she would routinely disappear from her desk without letting Abdalla know where she was and without arranging for coverage. CP 153, 164-72.

Given Larson's deficiencies, Abdalla arranged for two more experienced staff members, Ashlie Crawford and Vickie Winegar, to provide Larson with extensive additional training. CP 153. These trainings began in October 13, 2014 and continued until July 16, 2015, and typically lasted about an hour and a half. CP 153. Abdalla also had Larson's probationary period extended. CP 154.

While Larson was eager to learn in the first few training sessions, she lost her enthusiasm as the sessions went on. CP 17. Larson continued to make mistakes even in those areas where additional training had been provided. CP 17. For example, Larson's mistakes regarding budgeting, an area where extensive training had been provided, caused the Department to unnecessarily cover expenses that were outside of its budget. CP 17. Larson did not ask for help when she needed it and refused to take responsibility for the mistakes that she continued to make. CP 17, 260-61. Larson was also less than candid with her trainers, telling them "half-truths" when

discussing her errors, such as blaming faculty for her errors that she had created, and reporting that she had completed all of her tasks when she had not. CP 260-61. In all, at least seventeen of these additional trainings, each lasting about an hour and a half, were provided to Larson. CP 260. After Crawford learned that Larson was watching Netflix movies on her work computer and determined that Larson was largely just manipulating Winegar to perform her job for her, Crawford ended the sessions and reported the lack of progress to Abdalla. CP 260-61.

In addition to her poor performance and lack of sustained improvement, Abdalla had been informed of other concerns about Larson. CP 154-55. One of Larson's job duties was to supervise work-study students. CP 154. Abdalla had to counsel Larson about giving one of these students meaningful work after she learned Larson had assigned the student to count rubber bands and paperclips. CP 154. This same work-study student quit in April 2015, citing Larson's harassment and passive-aggressive abuse of her, including needlessly sending her across campus, talking over her when the student attempted to respond to questions from visitors to the department, and taking credit for the student's work and ideas. CP 154, 173-78. The work-study student also reported that Larson was watching Netflix and anime at work, despite knowing that there was additional work to be done. CP 178.

In addition to her performance problems, Larson was not following the leave notification procedure, which required Larson to email Abdalla of any absence or early departure, inform the rest of the department, and to let a neighboring secretary know in case coverage was needed. CP 154-55. Abdalla also discovered that Larson lied to her when Larson told Abdalla that a professor's computer needed to be replaced, an unplanned for cost to the Department, when in fact Information Services had not told Larson this was not the case and had already repaired the computer. CP 155.

Abdalla discussed Larson's behavior with Human Resources (HR) and initiated the progressive discipline process with a letter of expectations. CP 155. In the August 7, 2015 letter, Abdalla outlined her numerous performance concerns, including Larson's communication failures and budgeting problems, and, importantly, documented her expectation that if Larson would be absent, she needed to send Abdalla an email and contact a neighboring secretary for potential coverage of the World Languages Department during her absence. CP 179-83.

Larson's behavior did not improve. A month later, Abdalla provided a follow-up letter to Larson, documenting continued problems with meeting expectations, properly communicating with Abdalla and other professors, and correcting her budgeting mistakes. CP 155-56, 184-89. For example, one budget mistake was partially fixable by pursuing funds promised by

two of three other departments, but Larson only contacted the third, from which no funds were available, despite numerous written instructions from Crawford and Winegar. CP 185-86. Abdalla had also discovered that Larson was reporting hours in excess of those worked, logging hours before they had been worked, and working unapproved overtime. CP 184-89. In this second letter, Abdalla repeated the expectation that Larson communicate with her via email about any planned or unexpected absences. CP 188.

Abdalla and Larson met on September 23, 2015 to discuss the letters and related expectations. CP 156. As part of the learning process, Abdalla wanted Larson to take notes about the meeting and provide Abdalla with a report about the meeting directly thereafter. CP 156. The two met from 10:00 until 11:30, and then Abdalla told Larson to take her lunch. CP 156, 190-97. Larson went home sick for the rest of the day. CP 156.

When Larson reported to work the next morning, September 24, 2015, she asked Abdalla what work she should be doing, and Abdalla reminded her that she wanted a report of their meeting by the end of the day or else by noon the next day. CP 156. At approximately 4:10 p.m. on September 24, 2015, Larson informed Abdalla that she had fallen and injured her shoulder. CP 156. Abdalla took Larson to the hospital. CP 156. Abdalla never received the requested report from the meeting to discuss Larson's performance despite Larson having all day to provide it. CP 157.

B. Larson is Accommodated for Her Shoulder Injury

Larson was released from the hospital without any restrictions. CP 127. Although she came into work the next morning, Larson felt that she was unable to work due to her injury and left at noon. CP 157.

Stephen Sarchet, the University's Department of Labor and Industries (L&I) liaison, received medical documentation providing restrictions to Larson's ability to work until October 9, 2015. CP 157. No light duty was available during that time, so Larson was excused from work and kept on salary. CP 133. Pam Wilson, a Disability Administrator, discussed the situation with Abdalla on September 30, 2015 and installed Dragon Speech Recognition software on Larson's computer as an accommodation. CP 78. The University's light duty job description, including this accommodation, was approved by Larson's attending provider, Dr. Nathan Lilya, so Larson could return to work on October 12, 2015. CP 133, 137-39.

C. The University's Progressive Discipline Process

Separate and apart from Larson's injury, her ongoing performance issues needed to be addressed pursuant to the requirements of the Collective Bargaining Agreement (CBA). CP 210. The Dean of the College of Arts & Humanities, Dr. Stacey Robertson, worked with Katelyn Jones in Human

Resources (HR) to author a pre-disciplinary letter informing Larson that discipline was being considered. CP 210-11, 224-27. The letter described the various performance deficiencies previously identified by Abdalla. CP 210-11, 224-27. A pre-disciplinary meeting was scheduled for October 28, 2015, the same day that Larson's response to the letter was required. CP 210-11, 224-27. Larson did not provide any written response and could not attend the meeting, so the pre-disciplinary meeting was rescheduled for November 4, 2015. CP 210-11.

D. Larson Stopped Coming to Work for More Than a Month

Larson did not report for work on Monday, November 2, 2015. CP 133. On November 3, 2015, Larson provided a doctor's note that stated "Johanna Larson was seen today for an evaluation. She should not return to work today and until feeling better." CP 133, 141. The note was vague and did not identify any specific condition, so Wilson immediately reached out to Larson with paperwork to complete pursuant to the Family Medical Leave Act (FMLA) on November 3, 2015. CP 79-80.

Larson emailed Robertson that she would not be coming to work on November 4, 2015, due to her illness, but would come to the rescheduled pre-disciplinary meeting. CP 211. During their meeting, Larson was given the opportunity to respond to the allegations contained in the pre-

disciplinary letter. CP 211. Not only did Larson not take any responsibility for her performance deficiencies, she did not have any explanation for her inability to follow the leave notification procedures required by her supervisor. CP 211. Robertson determined that discipline was warranted, and again worked with HR to author a written reprimand. CP 211, 228-31. This written reprimand documented that if Larson would be absent from work, she needed to notify Abdalla and the entire department by email. CP 230. This was the third time this expectation had been conveyed in writing.

Other than attending the pre-disciplinary meeting, Larson was absent the entire week of November 2 through November 6, 2015. CP 157-58. She emailed Abdalla on November 6, 2015, notifying her that she was “still ill” and would not be in the office, without providing any explanation of her illness. CP 74-75.

Larson came into work on Monday, November 9, 2015, but then stated she was not feeling well and needed to go home about midday, without any explanation of her illness. CP 157-58. She suggested that she would do the same the following day—come in for a few hours and then leave. CP 157-58. Abdalla was concerned about the ongoing and unexplained illness that had now lasted more than a week, and discussed the matter with Jones and Sarchet in HR. CP 157-58. The three agreed that, pursuant to the CBA, Abdalla would request a note from Larson’s doctor

releasing her to work and providing any additional restrictions that required accommodation. CP 57, 202, 221-22. Abdalla sent Larson the following request via email:

Dear Johanna,

I am sorry you're continuing to not feel well.

To return to work, please obtain a note from your doctor to let HR and me know if/when you are released to work and/or if any modifications are needed. If modifications are needed, please include specifics and the length of time necessary. You'll need to visit with Pam Wilson about this as well.

I hope you feel better soon.

Take care,

Laila

CP 202. Larson did not respond to this email. CP 158. She did not communicate with Abdalla in any way after receiving this email. CP 158.

Larson did not report to work between November 10, 2015 and December 10, 2015. CP 133, 211. She did not notify anyone that she would continue to be absent. CP 158, 211. During this time, the University was concerned that her absence might be related to her injury, and Wilson sent Larson FMLA paperwork to complete should that be the case. CP 81-84. In her email, Wilson reminded Larson that it was her responsibility to remain in contact with both her supervisor and HR regarding her availability for work and anticipated return date. CP 81. Having received no response to her November 3, 2015 and November 17, 2015 emails providing FMLA

paperwork, Wilson again emailed Larson on December 2, 2015, reminding her to update her medical information by December 8, 2015. CP 83. On December 9, 2015, with the deadline having passed, Wilson emailed Larson to let her know that her FMLA designation had been rescinded due to lack of medical documentation. CP 84.

E. Larson Has No Medical Excuse for Her Extended Absence

Larson replied to Wilson that same day, on December 9, 2015, via email, stating she would be returning the FMLA paperwork as soon as possible. CP 84. It was received on December 10, 2015. CP 133-34, 142-44. The documentation did not provide any explanation for Larson's extended absence between November 9, 2015 and December 11, 2015. CP 133-34, 142-44. Her restrictions related to her shoulder injury remained the same and no new conditions requiring any further documentation had been added. CP 133-34, 142-44. The documentation, from Larson's attending provider for her shoulder injury, showed that Larson's extended absence was *not* due to her L&I injury. CP 133-34, 142-44. Indeed, Sarchet received an activity prescription form providing that not only had Larson's shoulder condition not deteriorated, but it had in fact improved, as the restriction from typing had been removed. CP 134. Larson returned to work on

December 11, 2015, after the academic quarter had ended at the University.
CP 158.

Both the University and Larson had questions regarding which of her absences were excused pursuant to her FMLA-qualifying condition—her shoulder injury. CP 85-86, 244, 256. Lisa Conn, Leave Administrator, was tasked with auditing Larson’s hours. CP 245. Conn had previously worked with Larson given her ongoing difficulties regarding reporting hours worked and leave taken, and had been working on restoring Larson’s hours lost for her workplace injury as provided by the “Kept on Salary” program. CP 243-44. The first problem Conn encountered was Larson’s improper entry of shared leave, which she was not eligible for and had not been approved to use. CP 244-45. As a result of this audit, it was discovered that Larson had misreported numerous hours and had been over-paid for 98.93 hours. CP 245, 258. Conn also determined that none of the absences between November 10, 2015 and December 10, 2015 were related to Ms. Larson’s shoulder injury. CP 245.

A meeting was held with Larson, Sarchet, and Jones to discuss her extended absence and her failure to notify her supervisor that she would be gone. CP 134, 150-51. She stated the reason for her initial absence between November 2 and 6, 2015 was because she was stressed out so her medical provider suggested she stay home. CP 150. Larson stated she did not come

to work because of Abdalla's email seeking a medical release upon her return. CP 150. She admitted that she did not communicate with Abdalla or anyone else about her continued absence, claiming that calling or emailing would impermissibly constitute "'returning to work' according to her legal advisor." CP 150. As Larson was not restricted from working during that period, this did not constitute a valid excuse to deviate from the expectation that she notify her supervisor of any absence. CP 134.

F. The Dean Determines Termination is Appropriate

Jones and Sarchet notified Dean Robertson of the result of this meeting. CP 134. Robertson worked with HR to draft another pre-disciplinary letter. CP 212, 232-35. A pre-disciplinary meeting was scheduled for January 8, 2016. CP 212. During that meeting, Larson still did not have any explanation for her absence. CP 212. She stated doctor's appointments had been cancelled, but that did not explain or excuse her failure to notify Abdalla of her continued absence. CP 212.

Without a valid medical excuse, Larson's extended absence constituted abandonment of her position under the CBA. CP 212, 218. Pursuant to the CBA, "Following an employee's unauthorized absence of four (4) or more consecutive working days, the University may separate an employee by sending a separation notice to the employee." CP 218. The

presumption was not acted on immediately with Larson as it was possible that her absence was related to her shoulder injury and may eventually be excused. CP 211. Even in that case, however, the CBA clearly requires employees to communicate with their supervisor daily about any absences due to illness: “The employee, unless physically unable to do so, must notify his or her supervisor as soon as the employee becomes aware that he or she will be absent from work and each day thereafter unless there is a mutual agreement to do otherwise.” CP 221-22. There was no mutual agreement to do otherwise; Abdalla had repeatedly requested communication via email when Larson would be absent from work. CP 182, 188.

Following the January 8, 2016 pre-disciplinary meeting, Robertson determined that termination was the appropriate level of discipline, given Larson’s failure to notify her supervisor about her continued absence despite numerous written directives to do so, and in conjunction with her history of poor work performance, poor communication skills, inability to take responsibility for her actions and failure to follow specific directives. CP 212, 239-42. Robertson provided her recommendation to Provost Stephen Hulbert, who ultimately made the decision. CP 212, 237. Larson’s employment was terminated effective January 14, 2016. CP 239-41.

V. PROCEDURAL HISTORY

Larson sued the University in June 2017, alleging violations of the Family Medical Leave Act, disability discrimination, wrongful discharge in violation of public policy, breach of promise, and violation of RCW 51.48.025. CP 1-5. The University filed for summary judgment on March 15, 2019, heard by the trial court on May 17, 2019. CP 262-84; RP 3. Larson titled her response to the University's motion as a motion for summary judgment as well. CP 290-313. The trial court noted that Larson had not followed the proper procedure, but the University agreed that in the interest of judicial economy, both motions could be considered on the same day. RP 3-4. The trial court denied Larson's motion. RP 36-37. It granted the University's, reasoning that there was not sufficient factual dispute regarding why Larson did not return to work, given that Larson admitted she was medically able to work. RP 39-41, CP 478-79. The only factual dispute the trial court found was whether or not Abdalla's email requesting the medical note relieved Larson of the burden of communicating with the University during her extended absence, but determined this dispute was not material to any of Larson's causes of action. CP 39-41.

On the same day that the motion for summary judgment was heard, Larson moved to amend her complaint to include the Washington counterpart, the Washington Family Leave Act (WFLA), to salvage her

claims brought under the Family Medical Leave Act (FMLA). CP 465-74. The University resisted amendment because it would be futile: Larson could not establish any entitlement to relief under the FMLA or the WFLA, which are treated identically, because she was not entitled to any medical leave that was improperly denied. CP 480-85. During the summary judgment hearing on May 17, 2019, the trial court considered the merits of Larson's claims brought under the FMLA. RP 36-37. Larson sought reconsideration of the grant of summary judgment on May 28, 2019. CP 491-509.

The parties reconvened before the trial court on June 3, 2019, to argue the motion to amend the complaint and to present the judgment. CP 477, 488-89; RP 43. The trial court initially stated that the motion to amend was moot pending its decision on reconsideration, then denied the motion to amend. RP 43-45. The trial court specifically noted that the new claims under the WFLA had identical elements to those already addressed within summary judgment under the FMLA, and that its decision on the motion to amend may have been different if the claims did not share the same elements. RP 45-46.

The trial court requested a response to the motion for reconsideration, and asked the University to specifically address the University's directive to Larson to provide a doctor's note releasing her to return to work after her weeklong absence. RP 45. The University addressed

the effect of the note on each of Larson's causes of action, including her FMLA/WFLA claims. CP 513-26. Reconsideration was denied. CP 534.

Larson appealed the orders granting the University summary judgment and denying reconsideration; she did not appeal the denial of her motion for summary judgment or the denial of her motion to amend her complaint. CP 540-41.

VI. STANDARD OF REVIEW

An appellate court reviews summary judgment orders *de novo*, undertaking the same inquiry as the trial court. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). The appellate court considers the materials before the trial court and construes the facts and inferences in the light most favorable to the nonmoving party. *Id.* Where reasonable minds can reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. *Id.* (citing CR 56).

To overcome an employer's motion for summary judgment, the employee must do more than express an opinion or make conclusory statements. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). The employee has the burden of establishing specific and material facts to support each element of his or her prima facie case. *Id.*

An appellate court may affirm summary judgment on any basis supported by the record. *Swinehart v. City of Spokane*, 145 Wn. App. 836,

844, 187 P.3d 345, 349 (2008). It does not, however, consider new arguments raised by the appellant for the first time on appeal. *Green v. Normandy Park*, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007) (citing *Ferrin v. Donnellefeld*, 74 Wn.2d 283, 687, 444 P.2d 701 (1968); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991); *Ashcraft v. Wallingford*, 17 Wn. App. 853, 860, 565 P.2d 1224 (1977)).

VII. ARGUMENT

Summary judgment was properly granted because Larson did not provide any evidence supporting her claims for relief. She did not provide either direct or circumstantial evidence that her shoulder injury was a substantial factor in her termination. Nor did she provide any evidence of a medically necessary accommodation that she sought but was not provided. Likewise, she did not provide any evidence showing that she was entitled to medical leave protected by either the Family Medical Leave Act or the Washington Family Leave Act that was interfered with, or that she was terminated for taking medical leave that she was entitled to.

The denial of Larson's motion for summary judgment and motion to amend are not properly before this court. She did not designate any related orders in her notice of appeal, and thus has not preserved those issues.

A. No Evidence of Disability Discrimination

1. Larson did not establish a prima facie case of discrimination

Larson provided no evidence showing disability discrimination. Larson may show a prima facie case of discrimination by providing direct evidence of discrimination, or by relying on an inference of discrimination through circumstantial evidence by satisfying the elements of a prima facie case provided by the *McDonnell Douglas* burden-shifting test. *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 743–44, 315 P.3d 610 (2013). She did not do either here.

Under the direct evidence method, Larson needed to provide evidence “(1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motivation was a significant or substantial factor in an employment decision.” *Id.* at 744. For example, the direct evidence in *Alonso* consisted of discriminatory statements made against the plaintiff in that case by the same person responsible for the adverse employment actions. *Id.* at 744-45.

Notably absent from Larson’s brief here, and her response to the University’s motion for summary judgment, is identification of any evidence showing that her termination was substantially motivated by disability discrimination. She simply states, without supporting facts, that a

“juror could conclude that Larson was terminated because Abdalla did not want to deal with her disability.” Appellant’s Br. at 17. This is insufficient, as a response to summary judgment cannot merely rely on “allegations or denials,” but “must set forth specific facts showing there is a genuine issue for trial.” CR 56(e). Nor is it true, as Abdalla worked with Wilson to accommodate Larson’s injury and was part of the process to bring Larson back to work within Larson’s restrictions. CP 78, 137.

The facts in the record show that Larson was terminated after a progressive disciplinary process where Dean Robertson was the main decision-maker, with final approval for the termination coming from Provost Stephen Hulbert, who ultimately made the decision. CP 212, 237. Larson’s unsupported allegations regarding Abdalla are immaterial, since Abdalla was not part of the termination decision. Larson provided no evidence of any discriminatory intent by Robertson or Hulbert.

Just as Larson provided no direct evidence of discrimination, she did not provide evidence satisfying the elements of a prima facie case provided by the *McDonnell Douglas* burden-shifting test. The prima facie elements require some proof that (1) that she was disabled, (2) that she was subject to an adverse employment action, (3) that she was doing satisfactory work, and (4) that the discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Anica v. Wal-Mart Stores*,

Inc., 120 Wn. App. 481, 488, 84 P.3d 1231 (2004). Larson did not and cannot satisfy the third or fourth elements.

Larson was not performing satisfactory work. Abdalla had initial concerns regarding Larson's work product within the first six months of Larson's employment and had her probation period extended. CP 154. Abdalla attempted to improve Larson's performance through weekly meetings with Larson to discuss performance expectations and Abdalla also arranged for extensive, additional training for Larson from two other highly experienced secretaries. CP 16-17, 153-54, 170, 260-61. Despite the effort expended by her trainers over *seventeen sessions*, Larson did not show any sustained improvement. CP 17, 261. Larson was then given a letter of expectations, a follow-up letter, and an official reprimand regarding her various deficiencies. CP 180-89, 229-31. The progressive discipline process was started *before* Larson's shoulder injury, not because of it. CP 180-89.¹

It is well documented that Larson was not performing satisfactory work. Larson alleges, without offering any supporting facts, that there is conflicting evidence regarding whether she was performing satisfactory work. *See* Appellant's Br. at 19. The interim evaluation notes that suggested some improvement by Larson, the only evidence of any positive

¹ The first letter of expectations was provided August 7, 2015; a follow-up letter on September 3, 2015. Abdalla and Larson met on September 23, 2015 to discuss Larson's performance. CP 156. Larson injured her shoulder the following day. CP 156.

performance in the record, are from March 17, 2015, before Larson's improvements faltered and declined. CP 165-72. Larson alleges that "for purposes of Summary Judgment it must be construed that Larson was performing satisfactorily," without any citation to the record showing such evidence. Appellant's Br. at 19. She cannot rely on any positive inference provided by the summary judgment standard without evidence to support it. Larson did not satisfy the third element of a prima facie case.

Likewise, Larson did not satisfy the fourth element of a prima facie case by providing any evidence that her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. This element can be satisfied by showing evidence that a similarly situated employee outside of her protected class was treated more favorably, that she was replaced by someone outside of the protected class, or that the employer continued to seek a replacement, thereby showing that the position was necessary. *Marin v. King Cty.*, 194 Wn. App. 795, 810, 378 P.3d 203 (2016). Larson failed to offer evidence of any of these, or any other evidence raising an inference of discrimination.

There is no evidence that someone substantially similar to Larson was treated more favorably. *Marin*, 194 Wn. App. at 810. The similarly situated employee, to be a proper comparator, must be substantially similar to the plaintiff in all material respects, including having the same supervisor,

being subject to the same standards, and having engaged in the same conduct. *Id.* at 811. If misconduct is involved, in order to be similarly situated, the plaintiff and her proposed comparator must have engaged in acts of “comparable seriousness.” *Clayton v. Meijer*, 281 F.3d 605, 611 (6th Cir. 2002). Larson offered no evidence that some other secretary, after ongoing documented performance issues, failed to report to work for more than a month without adequate excuse, failed to communicate with her supervisor during that period, and yet was not terminated.

Likewise, Larson offered no evidence regarding whom she was replaced by. Larson merely claims she was replaced by someone who did not need any accommodation. Appellant’s Br. at 19. Larson “may not rest upon the mere allegations or denials of a pleading,” but “must set forth specific facts showing there is a genuine issue for trial.” CR 56(e). The only evidence in the record is that Abdalla was able to arrange for *temporary* coverage of Larson’s position during Larson’s extended absence, in November 2015, but this was only through the end of the quarter. CP 158. Thus, Larson did not satisfy the fourth element of a prima facie case under any test.

Larson alleges that her need for accommodation was met with hostility, again without any citation to the record. Appellant’s Br. at 19. However, the facts clearly demonstrate that the University immediately

acted to accommodate her shoulder injury. It installed Dragon dictation software and worked with her doctor to ensure sufficient accommodations were in place before she returned to work. CP 78, 133. The record is equally clear that Larson was subject to poor performance reviews and discipline *before* her injury. Larson offers no evidence to prove otherwise. *See* Appellant's Br. at 19. As explained above, Larson was not performing satisfactory work from the inception of her employment. And, extensive (albeit unsuccessful) efforts by the University were made to improve her work, including the one-on-one training with more experienced staff offered from October 2014 through July 2015. When Larson's work was *still* unsatisfactory, the formal progressive discipline process began with a letter of expectations provided in August 2015, before Larson's September 2015 injury. CP 156, 180-89.

Larson was required to establish specific and material facts to support each of the elements of a *prima facie* case of disability discrimination. *See Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 147, 279 P.3d 500 (2012). She did not do so. Summary judgment was properly granted on Larson's claim of disability discrimination.

2. Larson cannot show pretext for discrimination

The University's termination of Larson, which occurred only after it determined there was no medical excuse for Larson's absence, was not

pretext for discrimination. If an employee can establish a prima facie case of discrimination, using either direct evidence or an inference of discrimination, the burden then shifts to the employer to provide its legitimate, nondiscriminatory reasons for Larson's termination. *Fulton*, 169 Wn. App. at 147. Even though Larson did not establish a prima facie case of discrimination, the University provided the trial court with ample evidence of nondiscriminatory reasons supporting its termination of Larson.

It is undisputed that Larson failed to come to work for over a month, failed to notify her supervisor of her ongoing absences, and failed to provide any medical excuse that prevented her from working. CP 133-34, 158. It is undisputed that Larson had poor communication skills, an unwillingness to take responsibility for her actions, failed to improve her work product after extensive additional training, and refused to follow the specific directives of her supervisor. CP 17, 180-96, 260-61. And it is likewise undisputed that these were the reasons for her termination. CP 212, 239-42.

Moreover, Larson's termination was consistent with the CBA, which assumes separation of an employee after four unauthorized absences, and here, Larson was gone for a full month—twenty-three unauthorized absences. CP 218, 258. The CBA also explicitly requires employees who are sick to notify their supervisor of their absence from work daily “unless physically unable to do so.” CP 221. Larson had demonstrated she was

capable of providing Abdalla with such notification on November 6, 2015, the last time she did so. CP 75, 221. The progressive discipline process had already begun when Larson stopped showing up for work. CP 180-89. The University had numerous legitimate, nondiscriminatory reasons for terminating Larson, contemporaneously documented, and completely unrelated to her workplace injury.

3. No evidence of pretext

Assuming that Larson had established a prima facie case of discrimination, which she did not, any inference of discrimination created by it drops out of the picture once the University provides its legitimate reasons for her termination. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). Then, to withstand summary judgment, Larson was required to show that the University's stated reasons were pretext for discrimination. To show pretext, a plaintiff must show that the defendant's stated reasons (1) have no basis in fact, (2) were not really motivating factors for its decision, (3) were not temporally connected to the adverse employment action, (4) were not motivating factors in employment decisions for other employees in the same circumstances, or else (5) present evidence that discrimination was a substantial motivating factor. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 447-448, 334 P.3d 541 (2014). Pretext is “a

lie,” a phony reason; even a “mistake” is insufficient to constitute pretext. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995).

Larson does not offer any evidence or argument that the University’s stated reasons are in fact pretext. *See* Appellant’s Br. at 22-24. Instead, she cites a list of actions that may constitute an adverse employment action in retaliation cases, which is irrelevant here. Appellant’s Br. at 24-25.

Larson seems to argue that her month-long absence from work was caused by her disability, and therefore her termination cannot be based on it. Appellant’s Br. at 20. However, Larson expressly admitted that there was no medical reason for her to miss a month of work: “There is no medical reason for me to have missed work.” CP 109. And she provided no medical evidence relating her absence to her shoulder injury. CP 109, 133-34. Further, she offers no explanation or excuse for her admitted failure to communicate with her supervisor or anyone at the University during this absence, especially when she had been repeatedly warned about communicating with her supervisor if she would miss work for any reason, a requirement of the CBA. CP 134, 150, 221.

A case should be submitted to a jury only when reasonable but competing inferences of discrimination exist in the record. *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 404 P.3d 464 (2017). But if the record conclusively reveals “some other, nondiscriminatory

reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred," then summary judgment should be granted to the employer. *Reeves v. Sandersen Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Here, the trial court correctly determined that Larson provided no evidence upon which a reasonable jury could find that her termination was motivated by disability discrimination.

B. No Evidence of any Failure to Accommodate

Larson admitted that the University accommodated her shoulder injury so she could perform the essential functions of her job: "At the time I believed that the accommodations were appropriate and fulfilled." CP 95. She admitted that no one asked her to perform any job duties that were outside of her restrictions. CP 96. Larson offered no evidence of any other disabling condition that required any accommodation.

To show a failure to accommodate, an employee is required to show that she (1) had a physical abnormality that substantially limited her ability to perform the job, (2) was qualified to perform the essential functions of the job in question, (3) gave her employer notice of the abnormality and its accompanying substantial limitations, and (4) after notice was given, the employer failed to affirmatively adopt measures that were available to the

employer and medically necessary to accommodate the abnormality. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004) (abrogated on other grounds by *Mikkelsen*, 189 Wn.2d 516). To defeat summary judgment, Larson was required to establish specific and material facts to support each of these elements. *Fulton*, 169 Wn. App. at 147. She did not.

Larson admitted that the University accommodated her shoulder injury. CP 95. Larson did not request any other medically necessary accommodation that was not provided. CP 32, 112-13, 114, 121.

There is no failure to accommodate a disability when the medically recommended accommodations are provided. *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 147, 265 P.3d 971, 980 (2011) (finding no failure to accommodate when employee given time off for surgery and light duty assignment based on doctor's recommendation). If there is no evidence that an accommodation is medically necessary, it is not reasonable to require it from the employer. *See, e.g. Riehl*, 152 Wn.2d at 147 (providing that plaintiff must show accommodation is medically necessary, because if there is no medical support for accommodation, it is not reasonable to require it from the employer). The 2007 amendments to RCW 49.60.040 did not change this requirement, as "there must be medical documentation indicating a reasonable likelihood that engaging in the job duties without accommodation 'would aggravate the impairment to the extent that it would

create a substantially limiting effect.” *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 29-30, 244 P.3d 438, 443 (2010) (quoting RCW 49.60.040).

Whether medical evidence was required to show the necessity of a requested accommodation was the precise issue in *Riehl*. In that case, the employee suffered from depression and post-traumatic stress disorder. *Riehl*, 152 Wn.2d at 142. He was previously accommodated following his hospitalization for respiratory failure when he was provided his full salary for working only six hours a day, permitted to leave work early, and permitted to take work home. *Id.* at 143. The employee later alleged a failure to accommodate his disabilities, including depression and PTSD. *Id.* at 148-49. But he did not provide any medical documentation showing that any additional accommodations, beyond those already provided, were indeed necessary. *Id.* Since the employer’s obligation is only to provide those accommodations that are medically necessary, summary judgment was properly granted and affirmed. *Id.* at 149.

Similar to the employee in *Riehl*, Larson presented no medical evidence that she needed any additional accommodations. Larson now argues, for the first time within her appeal, that she should have been provided an altered schedule as an additional accommodation for her shoulder injury. Appellant’s Br. at 8. This was not a request made by Larson or by her medical provider at the time. CP 87. In written discovery, the

University asked Larson to identify any requests for accommodation made but not provided, and her response was that “A party is not required to concede legal conclusions.” CP 32. Consistent with this statement, Larson offered no evidence that an altered schedule was requested or medically necessary.

An employee who requires an accommodation must provide her employer with notice of that need. This is true both when previous accommodations provided are no longer effective and when new accommodations are required. *Gamble v. City of Seattle*, 6 Wn. App 883, 891-95, 431 P.3d 1091 (2018), *rev. denied*, 193 Wn.2d 1006, 438 P.3d 115 (2019). In a similar case, the employee had previously been accommodated for a back injury, but did not request a rubber mat or the ability to work from home as an accommodation, thus the employer never had notice of these needs. *Id.* at 892-93. It could not, therefore, be faulted for its failure to address those needs in an interactive process. *Id.* at 893. Similarly, the employee in that case never alerted her employer that a different flexible schedule was a necessary accommodation, so the employer could not be held liable for any failure to accommodate her with a different schedule. *Id.* at 895.

The same is true here. Larson had an obligation to inform the University if previous accommodations were no longer effective, and if any

additional accommodations needed. She was reminded of this in Abdalla's email, which requested that Larson provide a medical release that included any additional modifications needed. CP 202. Wilson (from HR), who had provided Larson with the accommodation of dictation software, attempted to communicate with Larson during Larson's extended absence to determine if it was medically related, but Larson did not respond to Wilson. CP 78-86. Larson had every opportunity to engage in an ongoing interactive process with the University but failed to identify any additional accommodations needed. The University cannot be faulted for its lack of knowledge when that information was completely within Larson's control. *See Gamble*, 6 Wn. App. at 894 (providing that the employee has the burden of communicating whether an accommodation is effective because that turns on information within the employee's control).

Contrary to the facts, Larson additionally argues that she was not allowed to work under the restrictions as provided by her shoulder physician. Appellant's Br. at 28. However, the record is clear: Larson did work under those restrictions, without issue, until her "illness" that began on November 2, 2015. CP 133. Larson submitted a doctor's note on November 3, 2015 that stated she "was seen today for an evaluation. She should not return to work today and until feeling better." CP 141. After Larson missed an entire week of work with only that vague doctor's note

that provided no explanation of her absence, the University requested that she obtain a doctor's note when she returned to work, as contemplated by the CBA. CP 157-58, 202. The CBA provides that "Before returning to work after the employee's own serious health condition, the employee may be required to provide a fitness for duty certificate from a health care provider." CP 222. The CBA also allows that a supervisor may require a note "from a health care provider verifying the need for sick leave" after absences of three or more consecutive days or where there is reason to suspect leave abuse. CP 221.

Larson has offered varying explanations of her illness between November 2, 2015 and November 6, 2015. In her meeting with Sarchet on December 21, 2015, she stated she was stressed out. CP 134, 150. In her deposition, she stated she had a cold. CP 97. In her response to summary judgment, she attributed it to "complications from having a cold in conjunction with her Rheumatoid Arthritis." CP 293. In her appellate brief, she alleges it was due to her Rheumatoid Arthritis and relating complications from her shoulder, immune system, and having a cold." Appellants Br. at 8. She provided no medical evidence of any of these explanations. More importantly, there are no facts in the record connecting her absence between November 2 and November 6, 2015 with complications from her shoulder. Nor are there any facts in the record

showing that Larson was required to obtain a release and any additional restrictions specifically from her shoulder physician, as Larson alleges. *See* Appellant's Br. at 9. Thus, there is no evidence that Larson was not allowed to work under the restrictions put in place by her shoulder physician.

Larson provided no medical evidence showing any failure to accommodate any disability. Summary judgment was therefore properly granted and should be affirmed.

C. Larson Did Not Establish Any Violations of the FMLA

Larson alleged violations of the Family Medical Leave Act (FMLA) in her Complaint. CP 3. Suits against states for the self-care provisions of the FMLA are barred by sovereign immunity. *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 33, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012). Washington State has not waived its sovereign immunity to federal claims. *Harrell v. Dep't of Soc. Health Servs.*, 170 Wn. App. 386, 404, 285 P.3d 159 (2012). The University sought dismissal of these claims pursuant to sovereign immunity. CP 273-74. Larson provided no authority showing waiver, thus summary judgment was properly granted.

Larson does not assign error to the trial court's grant of summary judgment regarding her medical leave claims; rather, she assigns error to the trial court's denial of her motion to amend her complaint to include claims under the Washington counterpart, the WFLA. Appellant's Br. at 4-

5. However, that matter is not properly before this Court. Larson identified only two orders on appeal: the order granting the University's motion for summary judgment and the order denying Larson's request for reconsideration. CP 540-47. Larson failed to preserve any alleged error occasioned by the trial court's denial of her motion to amend. Accordingly, there is no basis to review this order pursuant to RAP 2.4.

Even if the denial of Larson's motion to amend was properly before this Court, there was no error in dismissing Larson's claims brought under either Act.² There are two causes of action available pursuant to the WFLA: interference and retaliation. Larson cannot show either.

1. No Evidence of Interference or Retaliation Under WFLA

To establish an interference claim under the WFLA, Larson must show that (1) she was eligible for the WFLA's protections, (2) the University is covered by the WFLA, (3) she was entitled to leave under the WFLA, (4) she provided sufficient notice of her intent to take leave, and (5) the University denied her WFLA benefits to which she was entitled. *Crawford v. JP Morgan Chase NA*, 983 F. Supp. 2d 1264, 1270 (W.D. Wash. 2013) (applying FMLA case law to a claim brought under WFLA.).

² On summary judgment, the University provided the trial court with authority showing that the WFLA is similarly construed to the FMLA. CP 274, 514-17. The trial court expressly stated that it understood the elements of both to be identical when it granted the University's motion for summary judgment. RP 18, 36-37, 45-46.

There is no medical leave that Larson was entitled to that was not provided. CP 133-34, 244-45, 258. An employer may require an employee to provide medical certification in support of the need for leave. 29 U.S.C. § 2613. While Larson returned the certification form, it did not provide any medical reason for her absence. CP 133-34, 143-44. Larson admits that she did not have any valid medical excuse for her prolonged absence. CP 33, 102, 104, 108-109. Thus, the third element of a WFLA claim, whether Larson was entitled to medical leave, is undisputed, and summary judgment was properly granted. *See Crawford*, 983 F. Supp. 2d at 1270 (providing that entitlement to leave is a necessary element of an interference claim).

Similarly, Larson must show that she was entitled to medical leave to establish a retaliation claim. Retaliation claims are treated consistently with the *McDonnell Douglas* burden-shifting framework. *Crawford*, 983 F. Supp. 2d at 1269. To establish a prima facie case of retaliation, Larson was required to show that (1) she availed herself of a protected right under the WFLA, (2) she was adversely affected by an employment decision, and (3) there is a causal connection between the two actions. *Id.* Since she was not entitled to any medical leave that was not provided, Larson cannot show that she availed herself of a protected right under the WFLA. Larson admitted both that there was no medical reason for her to miss work and that she was not on approved medical leave during extended absence. CP

109-10. Nor can Larson show any causal connection between her use of medical leave and her termination, the third element of a retaliation claim, or that her termination was pretext for retaliation based on her use of medical leave. *See Crawford*, 983 F. Supp. 2d at 1269-70.

Larson now alleges she should have been provided intermittent leave for her shoulder, but was instead forced to stop working completely. Appellant's Br. at 50. This misrepresents the record. Larson missed a week of work, came to work for a few hours, then went home, saying she would do the same the next day. CP 157-58. She was directed to provide a doctor's release since she had missed more than three days of work, and could have a serious health condition as contemplated by the CBA. CP158, 222. She could have simply returned to the health care provider who issued the original vague note of November 3, 2015 to obtain a release to return to work, but did not. *See* CP 141. And, importantly, Larson's termination was not based on her initial absence, but her failure to communicate with her supervisor about ongoing absences after November 19, 2015. CP 241. Larson cannot satisfy the third element of a retaliation claim, showing that her termination was causally related to her use of leave, given that her termination was mainly based on her failure to communicate with her supervisor, coupled with her prior poor work performance. CP 241.

2. Larson impermissibly raises new arguments under the FMLA not argued at the trial court

For the first time, Larson alleges that the University did not follow notice provisions contained within regulations governing the FMLA. *See* Appellant's Br. at 35-36. This Court should disregard all of these arguments. Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal. *Green*, 137 Wn. App. at 687 (citing *Ferrin*, 74 Wn.2d at 285; *Concerned Coupeville Citizens*, 62 Wn. App. at 413; *Ashcraft*, 17 Wn. App. at 860).

None of the arguments about notice were brought below. *Compare* Appellant's Br. at 33-41; CP 299-300. Thus, neither the University nor the trial court had any opportunity to respond to or address these arguments. Moreover, Larson provides no authority supporting her implicit assertion that showing any of these contentions, or even all of them, would support a cause of action under the WFLA. *See* Appellant's Br. at 41. At most, she argues technical violations of the FMLA's regulations, and unless she was prejudiced by such violations, she is not entitled to any relief. *See Crawford* 983 F. Supp. 2d at 1271 (providing that the FMLA provides no relief unless the employee has been prejudiced by the violation.) Because Larson showed no entitlement to protected medical leave, as required by 29 U.S.C. § 2613,

either to the University at the time or to the trial court in response to summary judgment, she was not prejudiced by any alleged notice violations.

Even if the issue of notice was properly before this Court, the University complied with its obligations under FMLA. It immediately provided Larson with relevant paperwork, reminded her when the deadline to return it was approaching, and conducted an hours audit to determine which, if any, leave was protected as related to an FMLA-qualifying condition. CP 81-86, 244-45. Larson has failed to offer any evidence showing that the documentation provided to Larson was inadequate in notifying her of her rights and obligations. The University did, in fact, notify her of the deficiencies contained in her provided certification and gave her the opportunity to provide additional documentation, thereby tolling the 15-day deadline. CP 134, 233-34. However, Larson never provided any medical certification showing that she was entitled to protected leave because a medical condition kept her from work for a month. And she admits that it is permissible for an employer to require an employee to communicate with it during the absence, and yet she failed to do so. Appellant's Br. at 38.

Next, Larson argues that the University impermissibly placed her on leave and then terminated her for that same leave. Appellant's Br. at 41-42. Larson argues this supports a "forced leave" claim. Appellant's Br. at 42,

citing *Sista v. CDC Ixis N. Am. Inc.*, 445 F.3d 161 (2nd Cir. 2006). But the University did not place Larson on leave, it merely required her to provide a doctor's note after missing more than a week of work. CP 158, 202. And even under the terms of the "forced leave" cause of action as she describes it, none has ripened here because Larson was not later denied leave that she was medically entitled to. *See* Appellant's Br. at 42-43.

Larson's next new argument is that she had already provided a release with restrictions from her shoulder physician, and then the University impermissibly required her to provide a new release before she was allowed to work with same shoulder injury. Appellant's Br. at 47. Larson again strays from the facts in the record with this argument. She had returned to a light duty position approved by her shoulder physician with the support of the University. CP 78, 133. But then she missed a week of work, caused by an unrelated and then-unexplained condition, and was directed to obtain a doctor's release when she returned to work. CP 157-58, 202. There was no requirement that she return to her shoulder physician for a new release when her illness was unrelated. CP 202.

Larson argues that the University violated the WFLA when it did not return her to her position "at the end of the authorized leave period." Appellant's Br. at 48. Here, there was no authorized leave period. Larson returned to her secretary position on December 11, 2015, and worked within

that position while the University attempted to determine whether she had any viable excuse not just for missing work for a month, but also for failing to communicate with her supervisor during that month despite numerous written directives to communicate about any absences via email. Dean Robertson determined that Larson had no viable excuse on either account. Even now, Larson provides no evidence showing entitlement to leave.

In sum, Larson was not impermissibly denied any leave that she was entitled to as protected medical leave. She was not terminated for using protected leave, and she was not retaliated against in any way for using protected leave. Larson was ill for more than a week, and she was merely directed to obtain a doctor's release upon her return to work. Instead of doing so, Larson stopped coming to work and stopped communicating with her supervisor. Larson had been told, numerous times, in writing, that she needed to email her supervisor if and when she would be absent. Yet, for one month, Larson did not email her supervisor regarding her ongoing absence. This failure, coupled with her previous and ongoing performance issues, lead to Larson's termination, not her use of protected leave.

VIII. CONCLUSION

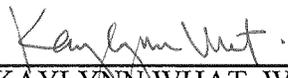
To withstand summary judgment, Larson needed to make a prima facie showing of her entitlement to some relief, including identifying

disputed facts in the record requiring a jury's determination. She did not.
Summary judgment was properly granted and should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of January, 2020.

ROBERT W. FERGUSON

Attorney General

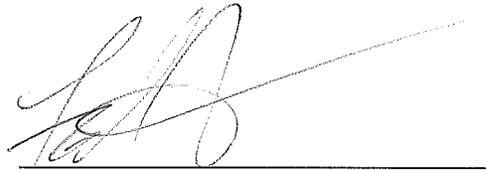


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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the state of Washington that the preceding Brief of Respondent was electronically filed via the Washington State Appellate Courts' Portal on the date below and that parties will be notified of such filing via the same.

DATED this 22nd day of January, 2020, at Seattle, Washington.



FARAND VINCENT
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